DEPARTMENT OF JUSTICE
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Dear Mr. Van Der Weele:

This is a response to your request, on behalf of Olympus America Inc. ("OAI") and C.R. Bard, Inc. ("Bard") (collectively "the parties"), for a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You requested a statement of the Department's antitrust enforcement intentions with respect to a proposed dealer and sales agency agreement between OAI and Bard ("Proposed Agreement").

OAI, the United States subsidiary of Olympus Optical Co., Ltd. ("Olympus") of Japan, sells and leases Olympus endoscopes and the video systems used with them ("endoscopy equipment"). Endoscopy equipment, in combination with endoscopy accessory products ("EAPs"), is used to examine and perform medical procedures in the upper and lower digestive tracts and the bronchial trees of patients. Each EAP is a separate medical instrument. OAI sells two types of Olympus EAPs: retrieval forceps (used to retrieve objects such as marbles swallowed by children) and biopsy forceps (used to obtain biopsy specimens). Essentially all the forceps OAI sells are reusable.

Bard does not manufacture or sell endoscopy equipment but does manufacture and sell a wide range of EAPs. It, however, does not sell retrieval forceps, and virtually all the biopsy forceps it sells are disposable.[1]

The parties suggest, but do not rely on the contention, that disposable and reusable biopsy

[1] Other types of EAPs are polypectomy snares, hemostasis devices, dilation balloons, stents, ERCP devices, biliary stone removal devices, enteral feeding devices and low profile feeding devices.

forceps are in separate product markets. While the cost of reusable biopsy forceps is significantly greater than the cost of disposable forceps, disposable biopsy forceps are four to eight times more expensive than reusable forceps on a per-use basis.

According to the parties, the Proposed Agreement is designed to broaden the range of products each company can offer customers and to create efficiencies that will benefit consumers and increase the sales of both companies. It designates Bard as the exclusive dealer for Olympus-branded EAPs in the United States and specifies that OAI will become Bard's non-exclusive sales agent. The parties plan to combine the complementary strengths of the Bard and OAI sales forces to become more competitive with other firms selling EAPs. OAI states that its sales force presently focuses on the sale of its long-lived, relatively expensive endoscopy equipment, which generally requires pre-sale, but not post-sale, visits to customers. OAI's sales force does not make the frequent customer visits that are typically necessary to inventory and restock a customer's EAPs properly. Implementation of the Proposed Agreement, however, will give OAI's customers access to Bard's sales force, which makes frequent visits to customers and is more skilled in servicing customers' EAP needs. Each party's sales force will be compensated under commission structures that provide equal financial incentives to sell both brands of EAPs. Similarly, pursuant to a specified formula, OAI and Bard will each receive a share of any incremental revenue in the other company's EAPs that its own sales force generates.

The Proposed Agreement contains provisions for integrating the parties' distribution operations. Customers will be able to purchase both companies' products with a single order and will receive a single shipment and a single invoice from Bard. Olympus EAPs will be shipped in bulk to Bard's warehouse, and Bard will break down the bulk packages, inventory the products, fill orders, and ship EAPs to customers. Thus, OAI will be able to eliminate resources previously devoted to these functions. The parties also anticipate additional efficiencies will be achieved by integrating the companies' marketing functions.

The Proposed Agreement creates a new endoscopy equipment and EAP leasing option that neither party could offer on its own: OAI will be able to lease the full line of Bard and Olympus EAPs, along with Olympus endoscopy equipment, on a cost-per-procedure ("CPP") basis. According to the parties, many customers find CPP leases desirable because all the non-labor costs for an endoscopy medical procedure are captured in a single price. This single price is useful because managed care insurers often reimburse on a CPP basis.

OAI will sell its EAPs to Bard at transfer prices negotiated by the parties at arms length, subject to annual adjustments. Any price increase may not exceed OAI's cost increase from Olympus. Bard will unilaterally set the retail prices for both its own EAPs and Olympus EAPs. Bard will be subject to a maximum resale price provision and to a minimum annual purchase requirement for Olympus EAPs. The maximum resale price provision limits Bard's net selling price to customers for Olympus EAPs to a maximum of OAI's 2000 list price in the first year of the collaboration. During subsequent years, Bard's maximum resale price is limited to the previous year's maximum plus or minus the change in OAI's transfer price to Bard. The

minimum annual purchase requirement increases if Bard's annual sales of Olympus EAPs increase.

Antitrust Analysis

OAI and Bard are each manufacturer-dealers of EAPs. Although implementation of the Proposed Agreement would establish a collaborative sales force and distribution system for the two companies, it will not affect the design and manufacture of EAPs. Olympus and Bard will continue the independent design and manufacture of their respective EAP product lines. Therefore, since the Proposed Agreement does not eliminate all competition between OAI and Bard, but only applies to their marketing, sales, and distribution of EAPs, the parties collaboration arrangements are most appropriately analyzed under the *Antitrust Guidelines for Collaborations Among Competitors*, issued by the Federal Trade Commission and the U.S. Department of Justice in April 2000 ("the *Collaboration Guidelines*"), rather than under the *1992 DOJ/FTC Horizontal Merger Guidelines*. See Section 1.3 of the *Collaboration Guidelines.*

To the extent that Bard and OAI compete in the sale of EAPs, the Proposed Agreement could reduce that competition since the parties' sales operations will be combined. However, by economically integrating the sales, marketing, and distribution operations of the companies, the parties' collaboration could also produce procompetitive benefits that OAI and Bard would not be able to achieve separately. Consequently, the parties' collaboration qualifies for Rule of Reason analysis, as set forth in Sections 1.2, 3.2 and 3.3 of the *Collaboration Guidelines*.

As those sections of the *Guidelines* explain, in analyzing a collaboration of competitors under the Rule of Reason, the first step is to examine the nature of the relevant agreement, including its asserted business purpose and whether it is likely to create or increase market power or facilitate its exercise. As outlined above, the essence of the Proposed Agreement is to make Bard the exclusive dealer of Olympus EAPs pursuant to several provisions. First, OAI must sell its EAPs to Bard at transfer prices subject to annual adjustments limited to OAI's cost increases from Olympus. Second, Bard independently sets the retail prices of its own and Olympus EAPs. Third, Bard is subject to a maximum resale price provision which limits its ability to raise the retail prices of Olympus EAPs. Fourth, a minimum annual purchase requirement militates against Bard profitably decreasing the quantity of Olympus-branded EAPs available to consumers. Fifth, the OAI and the Bard sales forces have financial incentives to maximize sales of both Olympus and Bard EAPs. The effect of these provisions appears to be the creation of incentives likely to achieve the parties' predicted procompetitive effects, while mitigating any possible competitive concerns.

In addition to the apparently benign nature of the parties' Proposed Agreement, even a brief consideration of the relevant market(s) implicated by the Proposed Agreement offers further assurance that the parties' collaboration is not likely to create or increase market power or facilitate its exercise. In this regard, it appears that each of the ten different types of EAPs (see footnote 1 and associated text above) constitutes a separate product market because none is a good substitute for performing the tasks that any of the others perform. Since biopsy forceps are

the only type of EAPs sold by both Bard and OAI, the market for this product is the only one we need examine for possible competitive concerns resulting from this collaboration. Furthermore, since there is a substantial cost difference between disposable biopsy forceps (the type sold by Bard) and reusable biopsy forceps (the type sold by OAI), these products may constitute separate markets. If true, Bard and OAI are not present competitors, and the Proposed Agreement does not raise any market power concerns.

In this case, however, it is not necessary to decide whether reusable and disposable biopsy forceps are in separate product markets. It suffices to observe that OAI's and Bard's combined shares of all reusable and disposable biopsy forceps sold in the United States do not appear to be significantly above the twenty percent "safety zone" for competitor collaborations established by the *Collaboration Guidelines*. See Section 4.2 of the *Collaboration Guidelines.* Consequently, even if the relevant market were all reusable and disposable biopsy forceps, the parties' combined U.S. market shares do not raise significant concerns about their ability to exercise market power. Moreover, in this case it appears that the Proposed Agreement is not likely to result in reduced competition, and the collaboration is likely to generate efficiencies that would outweigh any reduction. In particular, the collaboration may provide customers with more choices, greater convenience and better service with little likelihood of raising prices above competitive levels.

In summary, based on our examination of the purpose and nature of the Proposed Agreement, as well as the positions of OAI and Bard in the market for biopsy forceps, it appears that the parties' collaboration on the marketing, sale, and distribution of EAPs is not likely to create or increase market power or facilitate its exercise and could generate procompetitive efficiencies that could significantly benefit consumers. For these reasons, the Department has no present intention to initiate an antitrust enforcement action to challenge the Proposed Agreement. This letter, however, expresses only the Department's current enforcement intention and is issued in reliance on the information and representations contained in your submission. In accordance with our normal practices, the Department reserves the right, in appropriate circumstances, to bring whatever enforcement action it may believe is required in the future if the actual operation of the Proposed Agreement proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, except for any material for which you have requested and justified confidential treatment in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

Charles A. James
Assistant Attorney General